STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN STATE MEDICAL SOCIETY and MICHIGAN OSTEOPATHIC ASSOCIATION, Plaintiffs-Appellants,	UNPUBLISHED December 21, 2006
v	No. 269415 Ingham Circuit Court
BLUE CROSS BLUE SHIELD, Defendant-Appellee.	LC No. 04-001233-CZ

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting summary disposition to defendant in this case involving interpretation of a contract. We affirm.

Defendant, a Michigan health care insurance provider, contracted with a network of physicians, which includes plaintiffs' members, in what is known as defendant's Blue Preferred Plan Professional Provider Agreement, or "The Responsible Use System of Treatment (TRUST). This TRUST agreement, among other things, requires physicians to accept set fees for "covered services." The TRUST agreement defines "covered services" as "those health care services cited in Certificate(s) for which payment shall be made pursuant to the terms and conditions of this Agreement." "Certificate" is defined as:

> any and all Certificates/Riders/Benefit Plan Descriptions issued by [defendant] . . . or under its sponsorship, by an affiliate or subsidiary of [defendant] . . . , by the BCBSA, or by another BCBS Plan, and any changes or additions thereto as may be made by [defendant] . . . from time to time.

In 2003, GM, Ford, DaimlerChrysler, and other auto companies entered into an agreement with the United Auto Workers to form a new, self-funded health plan to be administered by defendant.[1] The automakers' previous self-funded health plans did not include

[1] Many employers provide health benefits through defendant by simply paying the insurance premium and allowing defendant to handle everything, including underwriting the risk. But (continued…)

physician office visits as a covered benefit. Consequently, TRUST network doctors were free to charge those insured under the plans any amount they wanted for office visits. Under the 2003 agreement, however, an office visit is a covered service subject to a 100 percent co-pay, or a covered service with no co-pay but with a $5,000 deductible. The net result is that an insured still pays the full cost of the office visit out-of-pocket, but the fee charged by the doctors is limited by the TRUST agreement because the office visit is a "covered service."

Plaintiffs filed suit alleging that, for self-insured plans covered by the TRUST agreement, (1) defendant is not a "sponsor" of the plans because it administers the plan without underwriting it and, (2) the materials prepared by defendant do not constitute "benefit plan descriptions" because the materials were not issued by defendant to the insureds and, (3) office visits are not a covered benefit under the TRUST agreement. Plaintiffs sought a declaratory judgment that office visits are not a "covered service" under the TRUST agreement, that defendant has no right to terminate physicians from the TRUST agreement for not limiting their fees as if they were "covered" under the TRUST agreement, and that defendant has no right to unilaterally alter the TRUST agreement.

The trial court found no latent ambiguities in the language of the TRUST agreement and concluded that the term "benefit plan descriptions" is clear and unambiguous and, under the plain language of the contract, was not restricted to benefit plan descriptions issued directly to plan enrollees. The trial court further found that the definition of "sponsor" is unambiguous and meant, "to assume responsibility for." Based on that definition, the trial court found that defendant's administrative activities qualified defendant as a "sponsor" of the plan. The trial court also found that the TRUST agreement provides clear and unambiguous consent for defendant to unilaterally modify the contract." It further found that the integration clause of the contract only affects prior representations or agreements, not subsequent modification of the agreement. The court also noted that if a modification was ever beyond what a doctor was willing to accept, that doctor would be free to unilaterally terminate participation with the TRUST agreement. The trial court then granted summary disposition to defendant under MCR 2.116(I)(2).

Plaintiffs first argue that the trial court improperly construed the meaning of the terms "sponsor" and "benefit plan descriptions" in the TRUST agreement, thus mistakenly concluding that office visits are a "covered service" under the TRUST agreement. We disagree.

We review de novo the grant of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Contract interpretation is also reviewed de novo, *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005), including a trial court's determination whether a contract term is ambiguous. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). The primary goal in contract interpretation is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The intent of the parties is found in the words of the contract

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some employers self-fund their health care benefits and merely hire defendant to administer the benefits in what is known as an administrative service contract.

and a court may not use extrinsic evidence to determine intent if the words are clear and unambiguous. *Id.* A contract is ambiguous if terms may reasonably be understood in different ways. *Id*. Words are to be construed according to their plain and ordinary meaning, avoiding technical or constrained constructions. *Id*. at 491-492.

When plaintiff's lawsuit was filed, the term "sponsorship" was not defined by the TRUST agreement.[2] According to the *Random House Webster's College Dictionary* (1997), the noun "sponsor" is defined as follows:

> 1. a person who vouches for, is responsible for, or supports a person or thing. 2. a person, firm, organization, etc., that supports the cost of a radio or television program by buying time for advertising or promotion during the broadcast. 3. a person or group that provides or pledges money for an undertaking or event: *the corporate sponsors of a race.* 4. a person who makes a pledge or promise on behalf of another. 5. a person who answers for an infant at baptism, making the required professions and assuming responsibility for the child's religious upbringing: godparent. [Emphasis in original.]

By administering the health care plans, defendant assumed a great deal of responsibility for those health care plans, even if it does not underwrite the plan. Under the plain and ordinary meaning of the term "sponsor," defendant is a sponsor under the TRUST agreement.[3]

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[2] Subsequently, defendant amended the trust to include the following definition:

> "[S]ponsorship" includes:
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> a. Self-funded administrative accounts of [defendant] . . . for which [defendant] . . . provides one or more of the following administrative services: utilization management, quality assessments, reviews, audits, claims processing systems or a cash flow methodology.
>
> b. Self-funded administrative service accounts for which another Blue Cross or Blue Shield Plan is Control Plan and [defendant] . . . is a participating plan and for which [defendant] . . . or the Control Plan assumes the risk of reimbursing TRUST PROVIDER for Covered Services in the event the payer becomes insolvent.
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> For purposes of this definition, "sponsorship" does not include Health Maintenance Organizations (HMOs) owned, controlled or operated in whole or part by [defendant] . . . or its subsidiaries, or by other Blue Cross or Blue Shield Plans or their subsidiaries.

[3] This meaning is in accord with the definition provided in defendant's amendment noted above.
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Plaintiffs' argument that the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.*, governs the TRUST agreement and that the definitions in ERISA must be applied when interpreting the TRUST agreement is unpersuasive. ERISA protects the benefits and pensions of employees in the employer-employee relationship. *Eid v Duke*, 373 Md 2; 816 A2d 844 (2003). Plaintiffs are not employees of defendant and receive no benefits from them. The TRUST agreement was made outside the context of an employee-employer relationship. Therefore, ERISA does not apply to the TRUST agreement. And while ERISA may provide evidence of the meaning of terms of that agreement by analogy, such extrinsic evidence is excluded from consideration in this case because the contract terms are unambiguous. *UAW-GM Human Resource Ctr*, *supra* at 491.

The definition of "benefit plan description" is also unambiguous. Read literally in the context of this contract, "benefit plan descriptions" means any written descriptions of the benefit plan, with no requirement that those descriptions be in any particular form or be given to any particular individual. Rather, the only requirement is that the benefit plan descriptions be "issued." "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).[4]

Thus, by the plain and ordinary definition of the terms of the TRUST agreement, defendant is a "sponsor" of the health care plans in question and the materials it issued regarding the changes in the plan for office visits are "benefit plan descriptions." Under the plain language of the TRUST agreement—which specifies that "covered services" are those services described in "benefit plan descriptions" defendant has issued for health plans it "sponsors"— office visits are properly considered a "covered service."[5]

Plaintiffs also claim the trial court improperly found that the TRUST agreement contains a provision allowing defendant to unilaterally modify the agreement with 60 days notice. Again, we disagree. As stated above, unambiguous contracts will be enforced as written. *Rory*, *supra* at 468. A contract is ambiguous if terms may reasonably be understood in different ways. *UAW-GM Human Resource Ctr*, *supra* at 491. The TRUST agreement provision that requires defendant to submit notice 60 days before substantial changes to the agreement strongly implies defendant's contractual right to unilaterally modify the agreement. Even though the TRUST agreement does not specifically state, "Defendant may unilaterally modify this contract," there

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See n 2.

[4] Again, interpretation of this phrase is not informed by ERISA for the same reasons set forth above. In any event, "benefit plan description" is obviously not the same wording as "summary plan description." It is reasonable to presume that if a contract is written with ERISA in mind, the exact language of ERISA would be employed. Thus, where a contract employs different wording, it is also reasonable to assume there was an intent to mean something other than what is found in ERISA.

[5] Amicus curiae American Medical Association claims that the TRUST agreement was an adhesion contract in defendant's favor does not alter this conclusion. "An 'adhesion contract' is simply that: a *contract*. It must be enforced according to its plain terms unless one of the traditional contract defenses applies." *Rory*, *supra* at 477 (emphasis in original).

would be no need for any notice requirement if defendant could not unilaterally change the contract. Any changes would be bilateral, meaning both parties would have to be on notice in order to come to a bilateral agreement in the first place. Further, if both parties agree about a change, such change would not be limited by any previous notice requirement because it would be a new agreement, thus making the notice provision a nullity. "[C]ourts must . . . give effect to every word, phrase, and clause in a contract to avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Plaintiffs' contention that any modifications of the TRUST agreement would fail for lack of consideration is also without merit. While it is true that consideration is required for parties to form a binding contract, *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000), defendant's unilateral modifications of the contract terms are not separate contracts from the original agreement. Defendant's power to unilaterally alter the contract was part of the original agreement and so it is supported by the original consideration for that agreement.[6] Therefore, the trial court properly found that the TRUST agreement unambiguously gives defendant the right to unilaterally modify the agreement.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[6] Further, plaintiffs are free to terminate the agreement if they disagree with defendant's new terms, and defendant is also free to drop plaintiff from the agreement. Arguably, therefore, there is mutual consideration in both parties agreeing to continue under the TRUST agreement when either party could opt out at any time.